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91-1784

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

GUY LEONARD PRINCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

When there is not unanimous concurrence among jurors polled after their verdict is returned in a criminal proceeding, whether and to what extent Fed. R. Crim. P. 31(d) permits the trial court an unstated, "third option" of accepting and recording a unanimous verdict reached after its ensuing colloquy with the nonconcurring juror, about his verdict, in open court.

II.

Whether a convicted defendant's appeal is sufficiently prejudiced where the trial court's violation of the Court Reporters Act [28 U.S.C. §753(b)(1)] mandate to record "all proceedings in criminal cases had in open court" occurs during a sidebar conference convened to discuss the lack of unanimity among jurors, polled pursuant to Fed. R. Crim. P. 31(d), when the jurors' numerical division is known.

PARTIES BELOW

Petitioner, Guy Leonard Prince, Defendant-Appellant below.

Jacinto Jose Banos, Defendant-Appellant below.

James Richard Miller, Defendant-Appellant below.

Respondent, United States of America, Plaintiff-Appellee below.

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No. _____

IN THE

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October Term, 1991

GUY LEONARD PRINCE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no reports of opinions delivered in the case by other courts or administrative agencies.

JURISDICTION

The *Per Curiam* Opinions and Orders, of the U.S. Court of Appeals for the Sixth Circuit, were respectively dated and entered May 22, 1990, and September 6, 1991.

The Court of Appeals' Order, Denying the Petition for Rehearing, was dated and entered March 4, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, the Sixth Amendment to the United States Constitution guarantees:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

In pertinent part, the Court Reporter Act [28 U.S.C. §753(b)] recites:

> ". . . Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; . . ."

Rule 31(d) of the Federal Rules of Criminal Procedure states:

> "*Poll of Jury.* When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

STATEMENT OF THE CASE

Petitioner had been indicted on felony charges of conspiracy [21 U.S.C. §846] and carrying a firearm in relation thereto [18 U.S.C. §924(c)].[1] In June 1988, he and two co-defendants stood trial in the U.S. District Court for the Southern District of Ohio.

Shortly before noon on Tuesday, June 21, 1988, the jury had been charged and retired to deliberate the case. Later that afternoon, the U.S. Marshal delivered the following jury note to the Court:

> "Dear Judge
>
> After 3 hours of deliberation on the indictments of Guy Leonard Prince, Jancinto [sic] Jose Banos and James Richard Miller, we are at a position of 11 guilty and 1 non-guilty on all counts and each individual named under each count. The one party voting not guilty at this time claims there is nothing that could change his mind and that furthermore they will not change their position."

Commenting that, "I am not going to let this jury go after all this time on three hours because one guy's holding out," the Court returned the following message to the jury:

> "To the jury:
>
> Upon consideration of the information contained in your note, I instruct you to continue your deliberations."

About a half-hour later, the jury indicated that it had reached a verdict and was returned to the jury box, whereupon its unanimous verdict of "guilty," on all counts against the Petitioner and his co-defendants, was announced in open court. Then, on polling the individual

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[1] Basis for federal jurisdiction in the court of first instance.

jurors as to whether the verdict announced was that of the juror polled, the following attention was paid to a nonconcurring juror:

"MR. DYE: Yes, your Honor. Juror No. 2, Mr. Odom, indicated only similar verdicts were his, not all of them.

THE COURT: Just a minute. Just a minute. Come up here. Come up here. Counsel, all counsel come up here.

* * *

Thereupon, Court and counsel confer at the bench out of the hearing of the jury.
[UNRECORDED]

* * *

Thereupon, the following proceedings were had at the bench out of the hearing of the jury:

THE COURT: Read back what Juror No. 2 said when Dick asked him if these were his verdicts.

MR. DYE: We started with Mr. Irwin.

(Polling of Mr. Odom read.)

MR. DYE: Your Honor, for the Court, he said some of them. He didn't say yes or no.

THE COURT: Did you hear it?

MR. DYE: Yes.

THE COURT: Did you hear anything he said?

MS. JONES: I didn't hear it, but make an inquiry.

* * *

Thereupon, the following proceedings were had in the presence and hearing of the jury:

THE COURT: Mr. Odom, please stand, Juror No. 2.

Mr. Odom, when the Clerk asked you if the verdicts as just read into the record, were these your verdicts, did you say yes?

MR. ODOM: I said semi.

THE COURT: You said what?

MR. ODOM: Semi.

THE COURT: Did you sign—did you sign the verdict form?

MR. ODOM: I was talked into it. I was talked into it.

THE COURT: What did he say?

MS. JONES: He was talked into it.

MR. ODOM: I was talked into the not [sic] guilty.

THE COURT: All right. I'm going to send you back and continue your deliberations, and I'm going to bring you back into the Courtroom.

Now, I want to ask you a question, again. Stand up. You participated in the deliberations?

MR. ODOM: Yes, I did.

THE COURT: And after discussion, after the foreman of the jury sent the question out to the Court and I sent my answer back to continue your deliberations, you say you were talked into voting for a conviction?

MR. ODOM: Pretty much.

THE COURT: All right. But you did vote for conviction; is that correct? You did agree, you did vote yes for a conviction along with the other 11 members of the jury?

MR. ODOM: Not at first.

THE COURT: What?

MR. ODOM: Not at first.

THE COURT: But you did finally?

MR. ODOM: Yes.

THE COURT: So your signature on the verdict form, which is under No. 1, that is your signature? That means that you voted yes in accordance with the verdict form; is that correct?

MR. ODOM: Yes.

THE COURT: All right. That's all. That's all.

* * *

Thereupon, the following proceedings were had at the bench out of the hearing of the jury:

MR. WEINER: Note our exceptions.

MR. DYE: Note exceptions.

I would ask that the Court question the juror to see if these are his—

THE COURT: No, I am not going to, not one word. Not one word.

* * *

Thereupon, the following proceedings were had in the presence and hearing of the jury:

THE COURT: Ladies and gentlemen of the jury, the Court thanks you for your services in this case and I'm going to discharge the jury now.

And ordinarily, the Court instructs the jury that they do not have to talk about how or why they arrived at the verdict in this case. There is a rule of Court in this District which does not allow counsel for the parties to question the jurors, and in your case, Mr. Odom, I specifically instruct you not to talk to the counsel in this case. Do you understand that?

MR. ODOM: Yes, sir.

THE COURT: You are bound by your verdict. Yes. All right. You are now discharged and the United States Marshal will conduct the jury from the Courtroom."

ARGUMENT

A. The U.S. Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court.

At trial, nothing quickens the pulse more than the jury's final return to the box. For the accused, the course of his remaining life and liberty will be forever charted, in a moment. That "moment," becomes eternity as the Court inquires; the foreperson replies; and the marshal conveys the paper verdict, from Box to Bench. The Court will peruse and pass the verdict to the Clerk to announce, in unanimous fashion, "We, the jury, find . . ."

Finis? Most likely. Of course, there is the usually-perfunctory exercise of the "poll," available to any principal for the asking, to confirm that each juror meant what he signed. On occasion, however, that confirmation evaporates when a nonconcurring juror mumbles, "Not really," or words of similar import. On that occasion, Fed. R. Crim. P. 31(d) provides that the court either (1) retire the jury for further deliberations, or (2) discharge it from further service, resulting in mistrial. At p. 11 of its *Per Curiam* Opinion and Order, entered below on May 22, 1990, the Court of Appeals recites the Rule and its *raison d'etre*:

> "According to Fed. R. Crim. P. 31(d), if 'upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.' The rule reflects the right of a defendant in a federal criminal prosecution to have his guilt determined only by a unanimous verdict of his peers. Obviously, the requirement of unanimity would be encroached upon should a trial judge seek to secure a unanimous verdict by coercing a juror into surrendering his conscientiously held view that the defendant should be acquitted."

Here, your Petitioner seeks plenary review of the trial court's exercise of an unstated, "third option" when the nonconcurring juror surfaces on polling, to wit: continued colloquy with that juror about his verdict in open court, and its sequelae.

Despite the simplicity of Rule 31(d) and the clarity of the two choices it gives the trial judge so situated, that third option has been frequently exercised and, on review, received varied treatment among the circuits. The purist view, condemning any dialogue between the trial judge and nonconcurring juror in open court, is reflected in *United States v. Sexton*, 456 F.2d 961 (5th Cir. 1972) (Conviction reversed and "Q: 'Well, is it your verdict?' A: 'Yes, sir.'" exchange *not* cured by subsequent, continued jury deliberations); *United States v. Lee*, 532 F.2d 911 (3rd Cir. 1976) (Approving *Sexton, supra* and, in dicta at 915, noting, "Responses by individual jurors to the court's questions are unpredictable, and a dialogue, once begun, is often difficult to stop before it causes damage."); and *United States v. Lopez*, 581 F.2d 1338 (9th Cir. 1978) (Also approving *Sexton, supra* and, at 1340, commenting that, ". . . the trial court is limited to two choices when the jury is not unanimous: the jury may be returned for further deliberations or it may be discharged.").

On reversing the convictions in *Matthews v. United States*, 252 A.2d 505 (D.C. App. 1969) and *United States v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970), the focus shifts, from one of denouncing the colloquy itself, to that of condemning the trial court's post-colloquy refusal to retire the jury for further deliberations before accepting its unanimous verdict. In n.3 at 1272 of *Amos v. United States*, 496 F.2d 1269 (8th Cir. 1974), Circuit Judge Bright observes:

> "Generally, in the cases upholding verdicts as not coerced, the trial courts have questioned the polled juror to resolve any questions and then returned the jurors for further deliberations. In cases finding verdicts to be coerced, the trial courts had demanded in-court categorical responses from jurors who expressed reservations or recalcitrance when polled, instead of returning the juries for additional deliberations." [Authority omitted]

The "third option" has gained wide acceptance where it has been limited to the "exceptional circumstance" of merely clarifying the nonconcurring juror's "apparent confusion." See *Williams v. United States*, 419 F.2d 740, 746 (D.C. Cir. 1969); *United States v. Edwards*, 469 F.2d 1362, n.5 at 1367 (5th Cir. 1972); *Sincox v. United States*, 571 F.2d 876, 878 (5th Cir. 1978); *United States v. Morris*, 612 F.2d 483, 489 (10th Cir. 1979); and *United States v. Spitz*, 696 F.2d 916, n.1 at 918 (11th Cir. 1983).

Here, despite its earlier approval of the trial court's adherence to Rule 31(d)'s two choices in declaring a mistrial in *United States v. Love*, 597 F.2d 81 (6th Cir. 1979), the Sixth Circuit Court of Appeals appears to have dramatically widened the scope of the "exceptional circumstance" under which the third option may be carefully exercised, from one of "clarifying apparent confusion" to that of "determining ambiguities" in the nonconcurring juror's response:

> "However, where a juror's response to a poll is ambiguous, it is incumbent upon the court, and consistent with Rule 31(d), to determine if, in fact, there was not unanimous concurrence."[2]

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[2] *Per Curiam* Opinion and Order [May 22, 1990], p. 11 (App. A11).

The question presented has never been addressed by this Court. However, it is an important question that should be reviewed and settled here, because of its Sixth Amendment implications;[3] due to the fact that, among the circuits, it has been painted with varying shades of gray; and since, "for the accused, the course of his remaining life and liberty will be forever charted, in a moment.", *supra* at p. 8.

[3] See *Sincox*, *supra* at 879; and *Morris*, *supra* at 488-489.

B. The U.S. Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court; and in So Doing, Also Rendered a Decision in Conflict With a Decision of the U.S. Court of Appeals for the Fifth Circuit on the Same Matter.

Initially, it is significant that, in citing and following *United States v. Gallo*, 763 F.2d 1504 (6th Cir. 1985) in affirming the conviction of Petitioner's Co-Defendant, James Richard Miller, below, the U.S. Court of Appeals for the Sixth Circuit has rendered a decision that is squarely in conflict with *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977) on the issue of the quantum of "prejudice" needed to reverse a criminal conviction, entered after a trial wherein the court violated the Court Reporters Act [28 U.S.C. §753(b)(1)] unequivocal mandate to record "all proceedings in criminal cases had in open court," where the defendant is represented on appeal by counsel other than his trial attorney. See unnumbered pp. 2-5 of its *Per Curiam* Opinion and Order entered September 6, 1991 (App. A18-A22).

Moreover, this "quantum of prejudice" issue, more generally, has never been addressed by this Court. Here, one of several unrecorded bench conferences occurred during a sidebar conference convened to discuss the lack of unanimity among jurors, polled pursuant to Fed. R. Crim. P. 31(d), when the jurors' "11-to-1 in favor of 'guilty' " division was known to the court.

Your Petitioner urges acceptance of review, on certiorari, to consider and determine (1) whether, without more, a criminal appeal is sufficiently prejudiced when the unrecorded bench conference is convened to discuss the "extremely delicate" trial situation presented by a lack of unanimity among jurors polled pursuant to Fed.

R. Crim. P. 31(d);[4] (2) whether, if not so sufficiently prejudiced, it becomes so when compounded by the trial court's awareness of the jurors' numerical division, in that situation, in the tradition of *Brasfield v. United States*, 272 U.S. 448, 71 L. Ed. 345 (1926) and its progeny;[5] and/or (3) whether a prophylactic, "per se" prejudicial error rule is needed to cure the repeated Court Reporters Act violations occurring throughout the federal trial court system. In this latter regard, see *Edwards v. United States*, 374 F.2d 24, n.2 at 26 (10th Cir. 1966); *Calhoun v. United States*, 384 F.2d 180, 183-184 (5th Cir. 1967); *United States v. Upshaw*, 448 F.2d 1218, 1223-1224 (5th Cir. 1971); *United States v. Piascik*, 559 F.2d 545, 547-548 (9th Cir. 1977); *United States v. Selva, supra; United States v. Brumley*, 560 F.2d 1268, 1280-1281 (5th Cir. 1977); *United States v. Garner*, 581 F.2d 481, 488 (5th Cir. 1978); *United States v. Smith*, 591 F.2d 1105, 1108-1109[6] (5th Cir. 1979); *United States v. Taylor*, 607 F.2d 153, 154 (5th Cir. 1979); *United States v. Gallo, supra* at 1530-1532; *United States v. Smith*, 787 F.2d 111, 114 (3rd Cir. 1986); and *United States v. Nolan*, 910 F.2d 1553, 1559-1560 (7th Cir. 1990).

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[4] *United States v. Brooks*, 420 F.2d 1350, 1353-1354 (D.C. Cir. 1969).
[5] *United States v. Aimone*, 715 F.2d 822, 833 (3rd Cir. 1983); and *United States v. Fiorilla*, 850 F.2d 172, 174-176 (3rd Cir. 1988).
[6] At 1109, the appellate court admonishes:

"It will be unfortunate if reversal of otherwise error-free convictions is the only way by which this simple and understandable requirement can be enforced."

APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 22, 1990)

NOT RECOMENDED FOR PUBLICATION

Nos. 88-4080, 4094 and 4095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES RICHARD MILLER
(88-4080),
GUY LEONARD PRINCE
(88-4094),
JACINTO JOSE BANOS
(88-4095),
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This is to be *prominently* displayed if this decision is reproduced.

BEFORE: WELLFORD and NORRIS, *Circuit Judges*; and LIVELY, *Senior Circuit Judge.*

PER CURIAM. Defendants Miller, Prince, and Banos appeal their convictions stemming from an underlying conspiracy to possess cocaine for further distribution. Defendants urge numerous grounds for reversal: (1) that the jury's verdict was not unanimous; (2) judicial misconduct; (3) improper upward departure in sentencing; (4) unconstitutionality of the Sentencing Guidelines; (5) failure to charge the jury on entrapment; (6) failure to grant a motion to sever; (7) insufficient evidence; and (8) improper admission of evidence.

I.

In November 1987, Arlis Frometa, an indicted coconspirator who is currently a fugitive, met with "Juan," a paid government informant. Juan was working with Mike Riccardo, an agent of the United States Customs Service in Miami who was preparing a sting operation. Juan's role was to act as a supplier from whom Frometa could purchase large quantities of marijuana.

Although the deal between Frometa and Juan was never consummated, during the course of negotiations Frometa asked Juan if he could supply him with cocaine. Frometa explained that he usually supplied "guys up North," but he needed to purchase an additional amount.

Frometa introduced Juan to Banos at Frometa's home in Miami. Following Agent Riccardo's instructions, Juan told Banos that he had cocaine to sell but that it was located in Columbus, Ohio. Banos told Juan that he was interested in a deal, that his friends could supply the necessary funds, and that he would fly to Columbus that evening.

Agent Riccardo and Juan flew from Miami to Columbus in order to meet Banos and his customers and, ostensibly, in order to obtain money for the cocaine. Simultaneously, Miller, Prince, and Banos traveled to Columbus. In a recorded conversation, Banos confirmed that he had enough money for ten kilograms of cocaine and that he would be able to obtain enough money for an additional five or six kilos.

Juan, accompanied by an undercover police officer, met with Banos in a Columbus hotel. Banos took Juan and the agent outside to a van, where he explained that the man in the passenger's seat, later identified as Miller, was the buyer and that the other man in the van, later identified as Prince, was the driver. Miller, Prince, and Banos showed Juan a large garbage bag filled with cash. Juan and the undercover officer left and other law enforcement officials arrested the defendants.

On February 18, 1988, the grand jury returned a six-count superseding indictment: Count 1 charged Miller, Prince, and Banos with violating 21 U.S.C. §846 (conspiracy to possess cocaine for further distribution); Counts 2 and 3 charged Banos and Miller with violating 18 U.S.C. §1952 (traveling in interstate commerce to carry on a business enterprise involving narcotics); Count 5 charged Banos with violating 21 U.S.C. §843(b) (using a communication facility to further the primary

conspiracy); and Count 6 charged Miller and Prince with violating 18 U.S.C. §924(c) (carrying a firearm in furtherance of the primary conspiracy).

Following a jury trial, defendants were found guilty on all counts. All three defendants were sentenced to prison terms of 181 months.

II.

1. Alleged Judicial Misconduct

Defendants Prince and Banos contend that the district judge's behavior deprived them of a fair trial. *See United States v. Hickman*, 592 F.2d 931, 936 (6th Cir. 1979). They claim that he adopted an antagonistic attitude towards them, that he impermissibly curtailed defense attorneys' questioning during voir dire, that he criticized their conduct during cross-examination, and that he adopted the role of "surrogate prosecutor."

This court has had prior occasion to review complaints concerning the trial judge's courtroom demeanor. Recognizing that he is a judge who requires meticulous observance of local court rules and courtroom etiquette, who "requires attorneys to frame questions properly and to refrain from testifying in the guise of asking questions," and who "sometimes shows his impatience with counsel," *United States v. Frazier*, 584 F.2d 790 (6th Cir.1978), we, nevertheless, did not hesitate to reverse a conviction where it appeared that his distinctive style prejudiced a defendant. *See United States v. DiCarlantonio*, Nos. 86-3941/42 (6th Cir. Sept. 30, 1987).

A review of the record reveals that the judge actively supervised the conduct of the trial. It records numerous interruptions, questions and unsolicited

remarks, some of which could be construed as sarcastic or hostile. Although some of these comments may have been unnecessary, when one considers the nature of the interruptions and comments as opposed to their sheer quantity, we cannot conclude that defendants were prejudiced or that the jury was tainted. Defendants quote a number of the judge's comments out of context and unfairly characterize others as being directed against their interests. Other comments were directed at the prosecution, not defense counsel. Many were warranted in order to clarify questions and answers. As this court has noted in the past, judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless patience and ability to resist provocation. *United States v. Worthington*, 698 F.2d 820, 827 (6th Cir. 1983) (citing *United States v. Weiss*, 491 F.2d 460, 468 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974)).

A judge is charged with conducting a jury trial in an orderly fashion, ensuring that issues are not obscured, and acting with a view to eliciting the truth. After a careful review of the judge's behavior during this five-day trial, we are unable to say he departed from this charge to the extent that his conduct was so egregious as to be fairly capable of characterization as being beyond that necessary to fulfill his role of "governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983) (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)).

Counsel allude to the trial judge having sometimes conducted off-the-record bench conferences. The Court Reporters Act, 28 U.S.C. §753, embodies a mandatory rule requiring that all proceedings in criminal cases had

in open court be recorded verbatim by shorthand or mechanical means. Furthermore, it is the duty of the court, not the attorneys, to make sure that the provisions of the Act are met. *United States v. Gallo,* 763 F.2d 1504 (6th Cir. 1985). However, violation of the recording mandate is not *per se* error, requiring reversal. Defendants must demonstrate that they were prejudiced. *Gallo,* 763 F.2d at 1531.

In a later decision, we commented further on procedures involving "off-the-record" side-bar conferences in a case conducted by the same trial judge.

> We do not read *Gallo,* however, to condone the regular practice of such off-the-record side-bar conferences. Indeed, requiring counsel to await the next recess to record his objections to the particulars of the last side-bar conference may well be prejudicial in that counsel may not recall exactly what was said during the conference or the exact nature of the error committed. Pressures of a heated criminal trial are not conducive to protecting defendant's rights under this procedure.

United States v. DiCarlantonio, Nos. 86-3941/42 (6th Cir. Sept. 30, 1987) (unpublished).

We cite this authority because it must have been clear to the district court that such "off-the-record" discussions are improper and strongly disfavored. The government did not respond in its brief to the complaint about the court's failure to record all the discussions and conferences that may have taken place during trial, perhaps because it was not separately set out by defendants as an assignment of error. At oral argument, counsel for the government did concede that this may have occurred. The burden is upon defendants, in any event, to demonstrate prejudice by reason of the error in failing to adhere to the requirements of 28 U.S.C. §753.

The district court may best recall the circumstances of such off-the-record conferences during the trial, and whether defendants, or any of them, were prejudiced by a failure to make a record of the rulings made, objections noted, or the like. We therefore must remand this case to the district court to address the effect of its failure to adhere to the requirements of 28 U.S.C. §753.

2. Upward Departure

Defendant Banos, the only defendant to testify in his own defense, argues that the district court imposed a sentence essentially four levels in excess of the range prescribed by the Sentencing Guidelines.

The transcript of the sentencing reveals the basis for the court's departure:

> The Court: The court will now state the offense level of C-87-200, the offense level is 30. The criminal history category is roman numeral I. The sentencing range is 97 to 121 months.
>
> However, in this case the Court believes that an upward departure from the guidelines is appropriate. The Court finds that in the trial of this case this Defendant, in taking the stand, clearly perjured himself when he testified in this case and that this aggravating factor was not adequately taken into consideration by the sentencing commission in formulating the guidelines.
>
> Pursuant to the sentencing reform act of 1984, it is the judgement of the Court that the Defendant, Jacinto Jose Banos, is hereby committed to the custody of the United States Attorney or his authorized representative to be imprisoned for a period of 181 months. This term consists of a term of 181 months on Count 1; a term of 60 months on Count 2; and a term of 48 months on Count 5; terms on Count 2 and 5 to run concurrently with the term imposed on Count 1.

Under 18 U.S.C. §3553(b), the sentencing court may impose a sentence greater than that provided by the range established by the Sentencing Guidelines if the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.

An upward adjustment of two levels is provided by the guidelines for a defendant who willfully obstructs the prosecution of his case by testifying untruthfully at his trial. Guideline §3C1.1. Even though perjury was taken into consideration when the Commission listed it as the basis for an adjustment, the district court still would have been warranted in departing from the guideline sentence, using Banos' perjury as the reason for the departure, if the court determined that, "in light of unusual circumstances" upward adjustment of two levels was inadequate. Guidelines §5K2.0. Since the district court did not set out unusual circumstances, Banos' cause must be remanded for resentencing. Upon remand, in order to increase Banos' sentence more than the two levels allowed by the upward adjustment for obstruction of justice, the district court must be able to articulate how Banos' false testimony amounted to an obstruction of justice "to a degree" not taken into consideration by the Commission. Although we concede that it may not be impossible to conceive of the existence of such unusual circumstances, we confess that we are hard-pressed to picture them. *See United States v. Sanchez Solis*, 882 F.2d 693, 698-99 (2d Cir. 1989).

In view of the remand directed, it may not be necessary that we address the remaining challenge made by defendants to the verdicts imposed. We do so, however, in the event the guilty verdicts are sustained

after full consideration of the matters which are submitted to the district court on remand. We have also remanded for reconsideration of the sentences imposed.

3. Poll of the Jury

Defendants assign as error the trial court's interrogating a juror whose response to a jury poll suggested lack of unanimity.

Three hours into its deliberations, the jury sent a note to the trial judge indicating that it was deadlocked at 11-1, and that the juror voting for acquittal "claimed there is nothing that could change his mind." The court advised the jury to continue deliberating and forty-five minutes later it returned a unanimous verdict of guilty on all counts.

According to the record, when the clerk conducted the poll and asked Juror No. 2 whether "the verdicts that I have just read into the record, are these your verdicts, sir?", he responded, "yes." However, at the conclusion of the poll, counsel for one of the defendants objected to discharging the jury since he thought that Juror No. 2 had indicated that only some of the verdicts were his. This colloquy ensued:

> THE COURT: Mr. Odom, please stand, Juror No. 2.
>
> Mr. Odom, when the Clerk asked you if the verdicts as just read into the record, were these your verdicts, did you say yes?
>
> MR. ODOM: I said semi.
>
> THE COURT: You said what?
>
> MR. ODOM: Semi.
>
> THE COURT: Did you sign—did you sign the verdict form?

MR. ODOM: I was talked into it. I was talked into it.

. . . .

THE COURT: All right. I'm going to send you back and continue your deliberations, and I'm going to bring you back into the Courtroom.

Now, I want to ask you a question, again. Stand up, You participated in the deliberations?

MR. ODOM: Yes, I did.

THE COURT: And after discussion, after the foreman of the jury sent the question out to the Court and I sent my answer back to continue your deliberations, you say you were talked into voting for a conviction?

MR. ODOM: Pretty much.

THE COURT: All right. But you did vote yes for conviction, is that correct? You did agree, you did vote yes for a conviction along with the other 11 members of the jury?

MR. ODOM: Not at first.

. . . .

THE COURT: But you did finally?

MR. ODOM: Yes.

THE COURT: So your signature on the verdict form . . . that is your signature? That means that you voted yes in accordance with the verdict form, is that correct?

MR. ODOM: Yes.

The court then discharged the jury, over the objections of defense counsel.

According to Fed. R. Crim. P. 31(d), if "upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be

discharged." The rule reflects the right of a defendant in a federal criminal prosecution to have his guilt determined only by a unanimous verdict of his peers. Obviously, the requirement of unanimity would be encroached upon should a trial judge seek to secure a unanimous verdict by coercing a juror into surrendering his conscientiously held view that the defendant should be acquitted.

However, where a juror's response to a poll is ambiguous, it is incumbent upon the court, and consistent with Rule 31(d), to determine if, in fact, there was not unanimous concurrence. The case before us is not one where a juror, having indicated some reluctance to express concurrence during a jury poll, is required to cast a vote in open court. *See, e.g., United States v. Sexton*, 456 F.2d 961 (5th Cir. 1972); *United States v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970); *Matthews v. United States*, 252 A.2d 505 (Ct. App. D.C. 1969). Here, the juror was not coerced by the trial judge into casting a vote.

Instead, when it became evident that, in response to the poll, the juror had said, "Yes, semi," it was necessary to clarify the response. This the court did by first ascertaining what the juror meant by his response and then what vote he had actually cast. Once the juror explained that, while he did "[n]ot at first" vote with the other jurors, but "finally" did so after he was "[p]retty much" "talked into it," the court was warranted in concluding that the juror had arrived at his verdict through the type of deliberative process in which juries are expected to engage; that he had in fact voted for a verdict of guilty and had not changed that vote when polled; and that the jury unanimously concurred in the verdict.

It may have been the better course to allow the attorneys on both sides to question the particular juror, separate from the other jurors, but considering all the circumstances, we find no error—no abuse of discretion in the action of the district court.

4. Constitutionality of the Sentencing Guidelines

The contention of defendant Prince, that the guidelines promulgated under the Sentencing Reform Act violate the Due Process Clause of the Fifth Amendment, is without merit in view of our decision in *United States v. Jacobs*, 877 F.2d 460 (6th Cir. 1989).

5. Failure to Charge Jury with Entrapment Defense

Defendants Banos and Miller contend that the district court's refusal to charge the jury with an instruction on entrapment constitutes reversible error. We disagree.

The Supreme Court recently reiterated the general proposition that a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. United States*, 485 U.S. 58 (1988).

Although entrapment is usually a question of fact, the district court has the duty of determining whether there is sufficient evidence to warrant the instruction or whether the issue can be resolved as a matter of law. Where the evidence is in dispute, the entrapment defense must be submitted to the jury. *United States v. Carroll*, 518 F.2d 187, 188 (6th Cir. 1975). By the same token, if the undisputed evidence demonstrates that no entrapment was evident, *i.e.*, government agents did not engage in conduct which "overbears an otherwise

innocent person's will and thereby induces him to commit a criminal act that he was not disposed to commit," the defense is inappropriate as a matter of law. *United States v. Ambrose*, 483 F.2d 742, 746 (6th Cir. 1973).

Banos and Miller assert a rather unique theory of entrapment. They argue that they were entrapped not because they did not conspire to do something, but because they did not conspire to do what the government wants to make it appear that they were doing. Their argument is, essentially, that while they engaged in behavior which could appear, after the fact, to be a cocaine distribution, their intent was really to perpetrate a fraud. Although Miller and Banos admit that they intended to "rip off" their coconspirators, they argue, nonetheless, that they were entrapped into engaging in one criminal act when they really only intended to engage in another, less serious offense.

Our primary focus is on defendants' predisposition to commit the crime rather than on the government agents' actions. *United States v. Fleischman*, 684 F.2d 1329, 1342 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982). While only slight evidence is necessary to create a triable issue of fact, the evidence must at least suggest that defendants were initially unwilling to commit the crime, or that the government involvement planted the criminal design in defendant's minds. *Id.* After reviewing the record, we are unable to find any evidence at all suggesting either that defendants were initially unwilling to commit the crime or that the criminal design was planted by the government.

Despite their argument that they were entrapped into participating in a "real" crime rather than the fraud they intended, the focus is on their predisposition to

engage in criminal conduct, and not on their reasons for participating in the conspiracy. An argument which merely challenges the purpose of the conspiracy while admitting its existence is insufficient to warrant an entrapment instruction.

6. Failure to Grant Motion to Sever

Prince contends that it was prejudicial error to require him to stand trial jointly with Banos and Miller and to deny his motion to sever Count 6 of the superseding indictment from the principal charge. As we are unable to say that the district court abused its discretion in either regard, the contention is without merit.

In order to warrant reversal, Prince must make a strong showing of prejudice. *United States v. Bibby,* 752 F.2d 1116, 1123 (6th Cir. 1985), *cert. denied,* 475 U.S. 1010 (1986). It is not sufficient that he merely asserts that evidence linking him to the conspiracy was weak and the jury was, therefore, confused as to the extent of his actual participation. The jury is presumed capable of sorting out the evidence and considering each defendant separately. *United States v. Franks,* 511 F.2d 25, 30 (6th Cir.), *cert. denied,* 422 U.S. 1042 (1975).

The trial court joined all counts after concluding, in accordance with Fed. R. Crim. P. 8(a), that they were all committed in furtherance of the conspiracy. Because Count 1 presented the underlying conspiracy, and Count 6 charged defendant with carrying a weapon in furtherance of the conspiracy, the district court was warranted in concluding that these two counts were part of the same series of acts.

7. Insufficient Evidence to Support a Verdict

Defendant Miller contends that there was insufficient evidence to support the jury's verdict that he possessed a firearm in furtherance of the conspiracy, since the gun was not found on his person but was located in the van equidistant between himself and another defendant.

Reviewing the evidence in a light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), we conclude that there was sufficient evidence to infer possession. Miller was seated in the front seat of the van and the semi-automatic pistol was on the console next to him. He was observed sitting in the passenger's seat of the van for one hour prior to his arrest and before Banos accompanied Juan to the van. Inside the van was a large quantity of cash, cocaine residue, and a cocaine testing kit. It was not unreasonable for the jury to conclude that the gun was intended to protect both the large quantities of cash and drugs involved in the transaction, an inference which supports the conclusion that Miller violated a statute which prohibits the possession of a firearm in furtherance of drug trafficking.

8. Improper Admission of Evidence

Miller argues that the district court abused its discretion by permitting a witness to testify that in the past she had received and purchased cocaine from him and had seen a large quantity of cocaine in his home.

Miller argues that the testimony violates Fed. R. Evid. 404(b)'s prohibition against using evidence of his character for the purpose of showing that, in pursuing the course of conduct with which he was charged, he was acting in conformity with that character trait. However,

the testimony was admitted to show that Miller was engaged in a continuing course of conduct, an element of the government's proof in demonstrating his participation in a business enterprise involving narcotics, in violation of 18 U.S.C. §1952. Rule 404(b) contemplates admission of this type of evidence "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Because the evidence was admitted to show a continuous plan of engaging in the business of selling cocaine, the testimony was the kind of "other acts" evidence contemplated by the rule.

We cannot say that the district court abused its discretion in concluding that the evidence's probative value outweighed any potential prejudice. An important indication of the probative value of evidence is the prosecution's need for the evidence in proving its case. *United States v. Vance*, 871 F.2d 572, 576 (6th Cir.), *cert. denied*, 110 S. Ct. 323 (1989) (citing *United States v. Benton*, 637 F.2d 1052, 1057 (5th Cir. 1981)). The only way in which the prosecution could prove that the present sale was not an isolated act was by showing that Miller had previously engaged in such behavior.

III.

With the exception of possible reversible error resulting from failure to record bench conferences and the matter of sentencing, none of the defendants' assignments of error is grounds for reversal. However, these cases are **remanded** to afford defendants an opportunity to demonstrate prejudice from the district court's failure to comply with 28 U.S.C. §753. Since Banos' sentence may not have been proper under the Sentencing Guidelines, his cause is also **remanded** for resentencing.

OPINION AND ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed September 6, 1991)

Nos. 90-3954/91-3110/3193

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GUY LEONARD PRINCE,
JACINTO JOSE BANOS,
JAMES RICHARD MILLER,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be *prominently* displayed if this decision is reproduced.

BEFORE: NELSON and NORRIS, *Circuit Judges*, and LIVELY, *Senior Circuit Judge.*

PER CURIAM. These are criminal cases in which the defendants, who were convicted on drug charges, contend that they were prejudiced by the district court's failure to have all bench conferences recorded. Finding no prejudice, we shall affirm the convictions.

I

Defendants Guy Leonard Prince, Jacinto Jose Banos, and James Richard Miller were tried and found guilty by a jury. On appeal from the convictions and sentences, this court remanded the cases to allow the district court to consider whether the defendants had been prejudiced by the court's failure to have all bench conferences recorded as required by the Court Reporters Act, 28 U.S.C. §753. We also asked the district court to give further consideration to an unrelated issue pertaining to the sentencing of defendant Banos.

No formal hearing was held on the failure-to-record issue. The matter was discussed at a status conference, however, and the defendants submitted briefs in which they tried to show how they had been prejudiced by the fact that some eighteen or nineteen bench conferences were not recorded. The district court issued a detailed opinion in which it concluded that the defendants had not carried their burden of showing prejudice. Again the defendants have appealed on the Court Reporters Act issue. Defendant Banos, who was resentenced, has not appealed his sentence as such.

II

The Court Reporters Act, 28 U.S.C. §753, provides, in pertinent part, as follows:

> "(b) Each session of the court ... shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method,

> subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge.... Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court...."

Recordation of bench conferences had in open court is mandatory, and it is the duty of the court to ensure that the requirement is fulfilled. *United States v. Gallo*, 763 F.2d 1504, 1530 (6th Cir. 1985), *cert. denied*, 474 U.S. 1068, 1069 and 475 U.S. 1017 (1986). Failure to record all proceedings is not prejudicial error *per se*, however. *Id.* at 1530-31. To determine whether a defendant was in fact prejudiced, the reviewing court must consider the circumstances reflected in the record surrounding the omission. *Id.* at 1531.

Defendant Prince points to no specific instance in which he claims to have been prejudiced by the lack of a record. He argues in essence that he was prejudiced because neither he nor the district judge can recall what was said during the unrecorded conferences. Defendant Banos likewise claims prejudice because of the length of time that has elapsed since the conferences occurred and the failure of memories as to what was said. Mr. Banos does recall two specific unrecorded bench conferences, however. Citing *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977), defendant Miller argues that he is entitled to a new trial without establishing that he suffered prejudice from the trial court's failure to record these conferences because "a substantial and significant portion of the record is missing, and [he] is represented on appeal by counsel not involved at trial." *Id.* at 1306. All of the defendants also argue that the district court erred in failing to conduct a hearing following the remand.

We agree with the district court that the defendants have failed to establish that they were so prejudiced by the failure to have every bench conference recorded that they are entitled to a new trial. We decline to find that the mere passage of time and the fading of memories establishes reversible error in a case such as this. The defendants' argument comes close to the one we rejected in *Gallo*: that all failures to record proceedings are *per se* reversible error.

We are not persuaded that the district court erred in failing to hold an evidentiary hearing. Although the parties agree that the possibility of such a hearing was discussed at the informal status conference, the defendants did not request such a hearing in the memoranda they filed with the district court. The memoranda disclose no need for a hearing, because they show no basic disagreement as to the number and general subject matter of the unrecorded bench conferences.

We have carefully reviewed the record surrounding the two bench conferences highlighted by Mr. Banos. The first occurred after his lawyer, Mr. Dye, completed his cross-examination of an agent of the Drug Enforcement Administration. Mr. Weiner, attorney for defendant Prince, was denied permission to ask further questions of the agent, and an unrecorded bench conference followed. The record reveals that shortly thereafter (seven pages later in the transcript), Mr. Weiner was permitted to put his exceptions on the record when the court called a morning recess.

The second conference occurred after the jury was polled and Mr. Dye objected to the discharge of the jury. The court's discussion with the juror who initially indicated reservations about the verdict was fully

recorded, as were the defendant's objections to the ultimate discharge of the jury. The conferences certainly should have been recorded, but the defendants have not demonstrated that they were prejudiced by the court's failure to see that they were. The defendants have simply not been able to suggest how a verbatim account of what was said in any of the bench conferences could possibly have shown that they are entitled to new trials.

The fact that Mr. Miller has a new lawyer is not sufficient to demonstrate prejudice. See *Gallo*, where we expressed ourselves as follows:

> "In some instances the failure of a court to follow the §753(b) mandate will require reversal. We disagree, however, that a separate, less demanding test need be applied when a defendant is represented by new counsel on appeal. Absent a showing by counsel on appeal of a reasonable but unsuccessful effort to determine the substance of the off-the-record remarks and the nature of a claimed error, reversal is not an appropriate remedy. In any event, we refuse to apply two standards in reviewing §753(b) problems when it happens that trial counsel and appellate counsel are not the same." 763 F.2d at 1530-31 (footnote omitted).

Although Mr. Miller's appellate counsel may not know any more about the details of the unrecorded bench conferences than we do, the general subject matter of each of the conferences at issue is apparent from the record, and we do not believe that Mr. Miller's right to a full record has been seriously offended.[1]

[1] It may well be that we have no jurisdiction to consider defendant Miller's appeal at all. The district court entered its order on October 16, 1990, and Miller's notice of appeal was not filed until February 20, 1991. The docket sheet on Miller's case reflects that he filed a motion to extend the time for taking an appeal on February 8, 1991, and this motion was granted by the district court on February

(Footnote continued on following page.)

AFFIRMED.

[Case #90-3954 only]

ISSUED AS MANDATE: March 17, 1992
COSTS: None
FILING FEE ..... $
PRINTING ..... $
TOTAL ..... $

(Footnote continued from preceding page.)

19, 1991. The district court concluded that an extension was warranted under Fed. R. App. P. 4(b) because the clerk of the court never sent a copy of the October 16 order to Mr. Miller's attorney. Miller's notice of appeal was filed within the extended time granted by the district court.

Fed. R. App. P. 4(b) requires a criminal defendant to file his notice of appeal within ten days of the entry of the judgment from which the appeal is taken. The rule further provides that "[u]pon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision." The words "not to exceed 30 days" presumably mean what they say. See *United States v. Hoye*, 548 F.2d 1271, 1273 (6th Cir. 1977) ("the district court has no power to extend the filing period beyond the time limit prescribed by the rule. . . . The failure to take any action whatever within 40 days of the entry of the judgment is invariably fatal.") We need not decide the jurisdictional question, however, where the case can easily be disposed of on other grounds. *Hall v. Knott County Bd. of Educ.*, No. 89-5888 (6th Cir. July 22, 1991) (reported at 1991 U.S. App. LEXIS 15773); *Ripon Society, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 576 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 10, 1988)

Case No. CR-2-87-200(1)

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

GUY LEONARD PRINCE, *et al.*,
Defendants.

OPINION AND ORDER

This matter comes before the Court to consider the motion of the defendants, Guy Leonard Prince, *et al.*, for a new trial. *See* Fed. R. Crim. P. 33. They argue that one of the jurors "did not concur in the entire decision of the jury and was, because of the nature of the verdict form, unable to express his opinion as to what defendant was guilty of which crime." Defendant's Motion at 3.

On June 21, 1988, the jury returned a guilty verdict on all counts of the indictment against the defendants. In a poll of the jury, Fed. R. Crim. P. 31(d), the Clerk asked each juror whether the verdicts were his or her own. All jurors responded, "Yes," except for Juror #2, Lawrence Odom. When polled, the record reflects that Odom answered "Yes." The Court and court reporter,

however, thought that Odom had mumbled something, though it was quite unintelligible to everyone present. Since the court reporter could not discern the babbled word, she recorded only "Yes" on the transcript. Record at V-120.

The Court then asked counsel whether they had any objection to discharging the jury. Ms. Jones and Mr. Weiner responded that they had no objection. Mr. Dye, though, did object on the ground that Mr. Odom indicated that only some of the verdicts were his, not all of them. *Id.* at V-122.

The Court then asked Mr. Odom what he had said when polled by the Clerk and his reply was "semi." *Id.* at V-123. That is, Odom seems to have contended that his earlier answer to the poll was in fact "Yes, semi." Odom explained that the other jurors had talked him into voting for a guilty verdict. *Id.* They convinced him in the end to concur in their otherwise unanimous decision to convict on all counts. Accordingly, he signed the verdict form along with the other jurors, voting to convict the defendants, concurring in a unanimous verdict. *Id.* at V-124.

The defendant argues first that Odom did not concur in the entire decision reached by the rest of the jurors. Although Odom may have stated "Yes, semi" when the Clerk polled the jury, the Court is only certain that Odom said "Yes" and perhaps something else. His mumbled word does not appear in the record. Nonetheless, even if Odom had said "Yes, semi," he did not mean that he rejected the verdict in whole or in part, in the final analysis. Instead, it is clear that Odom meant that he had reservations at first, but that the other jurors had convinced him to decide in favor of guilt. He could not have articulated this fact precisely with a

statement like "Yes, semi," but the Court finds that Odom did not intend to express a present doubt as to some or all of the verdicts.

The defendant argues second that the verdict form was inadequate to show each juror's assent to a guilty verdict on each count for each defendant. The Court finds that the verdict form was adequate. The form contained rows for each separate defendant under each count. If a juror did not concur in an otherwise unanimous verdict under one of the counts or for one of the defendants, the juror would have followed the Court's instruction to wait until unanimity had been achieved; the jury must be unanimous before it signs the form. Odom did sign the form and did not express any present doubts about the guilt of any of the defendants on any of the counts.

Therefore, the Court finds the defendants' motion for a new trial to be without merit and it is, therefore, DENIED.

IT IS SO ORDERED.

/s/ JOSEPH P. KINNEARY
United States District Judge

JUDGMENT OF THE UNITED STATES DISTRICT COURT INCLUDING SENTENCE

(Dated November 18, 1988)

Case Number CR-2-87-200 (1)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

V.

GUY LEONARD PRINCE

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

(Name of Defendant) Samuel Weiner
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s)_____

[x] was found guilty on count(s) 1 and 6 of the second Superseding Indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Offense*	*Count Number(s)*
21:846	Conspiracy	1
18:924(c)	Possession of firearm during and in relation to drug trafficking crime	6

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[x] It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
279-24-3587

November 18, 1988
Date of imposition of Sentence

Defendant's mailing address:

_____

_____

JOSEPH P. KINNEARY
Signature of Judicial Officer

Joseph P. Kinneary, Judge,
United States District Court.
Name & Title of Judicial Officer

Defendant's residence address:
8416 Old Farm Trail
Warren, Ohio 44483

November 18, 1988
Date

I CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN MY OFFICE ON 11-18-86.

KENNETH J. MURPHY
Clerk
By: R.L. LETTERMAN
Deputy Clerk
Date: 11-18-88

Defendant: Guy Leonard Prince
Case Number: CR-2-87-200 (1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of One Hundred Eighty One (181) months 15 years. This term consists of a term of One Hundred Twenty One (121) months on count 1 and a term of Sixty (60) months on count 6, to be served consecutively to the term imposed in count 1.

[ ] The Court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

a.m.
[ ] at _____ p.m. on _____.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: Guy Leonard Prince
Case Number: CR-2-87-200 (1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years.

This term consists of terms of Three (3) years each on counts 1 and 6 to run concurrently with each other.

While on supervised release, the defendant shall not commit another Federal, state or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

IT IS THE FURTHER JUDGMENT OF THE COURT that the indictment filed on 12-3-87 and the superseding indictment filed on 12-10-87 are hereby dismissed.

Defendant: Guy Leonard Prince
Case Number: CR-2-87-200 (1)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents [sic] and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other

controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent or a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 15, 1990)

Case No. CR-2-87-0200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

GUY LEONARD PRINCE, *et al.*,
Defendants.

OPINION AND ORDER

This matter comes before the Court on remand from the Sixth Circuit Court of Appeals to consider the effect of this Court's failure to adhere to the requirements of 28 U.S.C. §753, The Court Reporters Act, in the trial of the defendants, Guy Leonard Prince, James Richard Miller, and Jacinto Jose Banos.

Although this specific issue was only alluded to by the defendants on appeal,[1] it arose in the context of alleged judicial misconduct. In their supplement

[1] Indeed, defendant Miller made no reference to unrecorded bench conferences at all in his appellate brief, while defendants Prince and Banos mentioned it as an aside without developing the issue sufficiently to apprise the reviewing court of the substance of their objections. For example, in reviewing the appellate brief and reply brief of Prince, this Court found reference to two instances during the trial that counsel felt merited attention. In both cases, the reference was a fleeting one. *See* Brief of Appellant Prince at 17, 32. *See also* Reply Brief of Appellant Prince at 2, 9-10.

memoranda on the subject, the defendants assert that on nineteen occasions the Court conducted side bar conferences in the absence of a court reporter, thus failing to record the precise colloquies between the parties.[2] The failure to make such a record, it is asserted, prejudiced the defendants and deprived them of a fair trial. It is this Court's duty to examine the trial record to determine whether or not actual prejudice resulted from the Court's failure to record these side bars. For the reasons that follow, a hearing will not be necessary to resolve these objections.

STANDARD OF REVIEW

The statutory authority for the defendants' complaint is The Court Reporters Act, 28 U.S.C. §753, which states in pertinent part:

> (b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or by

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[2] The following list comprises all of the unrecorded bench conferences:

1. Volume I @ 49
2. Volume I @92
3. Volume I @134
4. Volume II @222
5. Volume II @269
6. Volume II @294
7. Volume II @320
8. Volume II @366
9. Volume II @373
9. Volume II @383
10. Volume III @12
11. Volume III @72
12. Volume III @108
13. Volume III @239
14. Volume IV @50
15. Volume IV @70
16. Volume IV @143
17. Volume IV @146
18. Volume V @4, 6, 8, and 26
19. Volume V @122

> order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the judicial conference: (1) all proceedings in criminal cases had in open court.

This statute has been interpreted to state a mandatory rule of conduct for all trial courts. *United States v. Gallo*, 763 F.2d 1504, 1530 (6th Cir. 1985). Compliance with the rule is to be regulated by the trial court in all instances. It is, therefore, the court's duty to assure compliance, and not that of the defense counsel. *Id.* Failure to comply with the requirements of the Act, however, does not constitute *per se* error. Rather, it is incumbent upon the defendants to show to the reviewing court specific instances of prejudice. "In order to require [a new trial], some specific error or prejudice resulting from the failure to record such proceedings must be called to the Court's attention." *United States v. Long*, 419 F.2d 91, 94 (5th Cir. 1969). Stated differently, the appellant must show that the failure to record and preserve the aggrieved portions of the trial proceedings "visits a hardship upon him and prejudices his appeal." *United States v. Selva*, 559 F.2d 1303, 1305. Thus, the inquiry of the reviewing court is whether the failure to record the proceedings is *itself* the cause of the prejudice suffered at the trial, or at the appellate level.[3]

[3] Counsel for the defendant Miller contends that, unlike his colleagues, he is not required to show actual prejudice in order to win a new trial for his client. He relies on *United States v. Selva* for the proposition that if appellate counsel is not also the trial counsel, then he need only show the absence of a substantial and significant portion of the record. *Selva*, 559 F.2d at 1306. However, the Sixth Circuit specifically rejected this position in *United States v. Gallo*, 763 F.2d 1504, 1510-31 (6th Cir. 1985). The Court reasoned that the two-tiered standard would only invite the manipulation of appellate causes to achieve unmerited reversals. Thus, all of the defendants in the instant case will be required to make a showing of actual prejudice in order to prevail.

In *Gallo*, the Sixth Circuit also instructed that

> In determining whether hardship or prejudice results from a trial court's failure to record every statement made in "open court," the reviewing court must consider all the circumstances surrounding the omission.

763 F.2d at 1531. Therefore, according to the *Gallo* opinion, the defendant has the burden of making an affirmative showing of harm or prejudice resulting from the omission from the record of the aggrieved statements, whereupon the reviewing court is obliged to search the general context in which the omission occurred in order to determine whether any such harm was actually suffered. With this standard in mind, the Court now turns to the objections at hand.

ANALYSIS

The first two exceptions occur with respect to omissions found at Volume II, page 366, and Volume IV, page 50 of the trial transcript, both of which preceded the Court's curtailment of cross-examination. The defendants assert,[4] and the government agrees, that the first section dealt with the cross-examination of Agent Riccardo regarding the defendants desire to pursue a particular line of questioning. In the second exception the defendants claim that the Court interrupted them in their questioning, and that had the side bar been recorded, the Court's reasons for the interruption would have been made clear.

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[4] The defendants concur as to the disputed portions of the record. Indeed, counsel for defendant Miller has chosen to incorporate by reference the memorandum of defendant Prince. Accordingly, the Court will treat the proffered objections as applicable to all of the defendants.

In neither case have the defendants carried their burden of showing the Court how the omission of the side bar from the record worked to prejudice their clients. Instead, they seem to be arguing that it was the Court's refusal to allow them to pursue their line of questioning that constituted the harm suffered, not the omission itself. The real issue, then, is the limitation of cross-examination. But that question could have been raised on appeal without the aid of a transcript of the side bar argument, for any harm suffered would have resulted from the curtailment of the questioning itself, all of which appears in the transcript. Yet the defendants have failed even to show how the cross-examination hurt their clients.

Notwithstanding the defendants' failure to meet their evidentiary burden, the Court notes that the record also refutes their contentions. For example, with respect to the conference at Volume IV, page 50, the defendants object only to the alleged failure of the Court to state its reasons for controlling cross-examination. First, the record reflects that the line of questioning was completely irrelevant to the issue of guilt of [sic] innocence of the defendants, a point made clear by the Court, on the record, at Volume IV, page 48. Thus, the Court was clear in its reasoning for limiting cross-exmination. Second, the Court took a fifteen minute recess during which counsel proffered its objections to the Court's alleged interruptions. Volume IV at 57-59. The objections were thus recorded and before the appellate court upon review of the case. Moreover, because they reflect the contemporaneous concerns of counsel, the defendants are precluded from any claim that passage of time caused them to forget what the precise objections were. Finally, the court's reasons for curtailment of cross-examination, though abundantly clear on the record, are irrelevant to

the fact of the curtailment itself. Whether the Court's reasons were right or wrong would in no way increase or diminish the actual effect of the cross-examination, or any harm that might have resulted from the Court's directions. In any case, the Court's statement on the record of its reasons for limiting cross-examination cures the asserted defect created by the omission of the side bar, and even if the Court's statement was not sufficient, the defendants stated their objections in full, on the record, thus preserving the question for appeal. It is clear, then, that the omission itself did not cause the defendants to be prejudiced in any way. Accordingly, objections one and two are DENIED.

In their third objection, the defendants argue that off-the-record comments by the Court during the conference on the proposed jury instructions should have been transcribed because "any matter involving jury instructions, . . . if they were germane to the charge of law, . . . should have been recorded." *See* Volume V at 4, 6, 8, 26.

Because the defendants have failed to call to the Court's attention the nature of the prejudice alleged, it is not possible to address the defendants' claim with any degree of certainty. The Court notes, however, that with respect to the side bar at page 26, counsel stated their objections on the record. Given that the parties were discussing the specifics of the conspiracy charge prior to the omission, and that counsel subsequently stated their objections, it is clear that the side bar related to that issue. Any prejudice that might have resulted could easily have been raised on appeal on the basis of the proffered objections. There is no indicating here that the omission from the record was itself responsible for any harm, if indeed harm there was. The same result obtains

for the other omissions cited. It is notable that the discussions both before and after the omissions are strikingly unremarkable, and the defendants lodged no contemporaneous objections to the substance of those conferences other than those already contained in the record. Because the mere failure to comply with the requirements of the Court Reporters Act does not constitute *per se* error, the mere failure to record these conferences is not by itself grounds for reversal. Because the defendants have shown nothing prejudicial in the omissions here at issue, their objection is DENIED.

The fourth objection concerns the poll taken of the jury subsequent to delivery of the verdict. The defendants claim that because their assignment of error on this issue was denied by the appellate court, it is now critical that the off-the-record discussion be known. Once again, the defendants have utterly failed to call to the Court's attention any specific error or prejudice resulting from the failure to record that particular conference. Given that the transcript fully covered the open-court exchange between the Court and the juror, and that the Sixth Circuit has already denied the objection, there is no reason to revisit this issue.

The defendants have, however, raised a far more troubling question. They argue that "the importance of recording any part of the colloquy between the court and the juror in question is" critical to their case. The defendants seem to be suggesting that the Court engaged in an off-the-record conversation with the juror, and not with counsel to the case. The Court would be inclined to agree with the defendants that prejudice had occurred were there any truth to this claim. Yet, there has been presented no evidence that such an exchange took place, nor is there any allegation of the substance of

the alleged discussion. Rather, the defendants rely on the bald assertion that it is so. Examination of the transcript, however, reveals that it is most unlikely that such a colloquy ever took place. The transcript records a dialogue with juror number two which appears to have occurred entirely on the record. The Court's questions followed a logical progression that assumed no knowledge other than that gleaned from the recorded conversation. Moreover, the juror's responses reflected the same progression, in no way making reference to information learned or questions posed during the contested period of omission. Simply put, counsel has made reference to an event that never took place. The objection is DENIED.

In their penultimate objection, the defendants assert generally that the jury could overhear the conversations at the bench. Because, defendants argue, counsel was admonished during these conferences, "it is very likely the Defendants were severely prejudiced." Again, counsel has not shown the Court any specific instance of prejudice arising from the failure to record these side bars. Even if such discussions did contain the seeds of prejudice, counsel for the government was an equal recipient of the Court's instruction. The Court notes also that after an exhaustive and diligent review of the entire trial proceedings, the Sixth Circuit concluded that the defendants were not prejudiced nor the jurors tainted. Given that none of the contested side bars during this lengthy trial produced any prejudice to the defendants, the vague allegations here asserted are simply too thin a reed upon which to sustain a request for a new trial.

Finally, the defendants suggest that the passage of time alone is sufficient to warrant a new trial, since they are no longer able adequately to recollect the precise

difficulties the unrecorded side bars may have caused. The gravamen of this objection is to encourage the Court to treat the asserted omissions, without more, as grounds for a new trial. This the Court cannot do because, once again, the omission of the side bar from the record is not *per se* error. Moreover, given the Court's disposition of the other objections, there remains no underlying substantive basis upon which to sustain this objection. The Court has been able to determine from the circumstances in the record surrounding the omissions that no prejudice redounded to the detriment of the several defendants. For that reason, there is no reason to grant the defendants a new trial.

WHEREUPON, upon consideration and being duly advised, the Court finds defendant's objections to be without merit, and they are, therefore, DENIED.

IT IS SO ORDERED.

/s/ JOSEPH P. KINNEARY
United States District Judge

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME

(Filed October 17, 1991)

Case No: 90-3954

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GUY LEONARD PRINCE,
Defendant-Appellant.

ORDER

Upon consideration of appellant's motion for leave to file a petition for rehearing out of time,

It is ORDERED that the motion be, and it hereby is GRANTED.

It is further ORDERED that the mandate be recalled and the appeal reinstated to the active docket.

ENTERED BY COURT OF THE COURT

/s/ LEONARD GREEN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed March 4, 1992)

Case No: 90-3954

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GUY LEONARD PRINCE,
Defendant-Appellant.

ORDER

BEFORE: NELSON and NORRIS, *Circuit Judges;* and LIVELY, *Senior Circuit Judge.*

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

PARTIAL TRANSCRIPT OF PROCEEDINGS

No. CR-2-87-200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUY LEONARD PRINCE
JANCINTO JOSE BANOS
JAMES RICHARD MILLER,
Defendants.

PROCEEDINGS

before the Honorable Joseph P. Kinneary, Judge, and a jury being duly impaneled and sworn, on Tuesday, June 21, 1988.

VOLUME V

APPEARANCES:

MS. ROBYN R. JONES
Assistant United States Attorney
85 Marconi Boulevard
Columbus, Ohio 43215,

On behalf of the Plaintiff,
United States of America.

MR. SAMUEL WEINER
743 South Front Street
Columbus, Ohio 43206,

On behalf of Guy Leonard Prince, Defendant.

MR. LEWIS WILLIAM DYE
Dye, Fleck & Krivoshey
555 South Third Street
Columbus, Ohio 43215,

On behalf of Jancinto Jose Banos and James Richard Miller, Defendants.

* * * * *

[JURY QUESTION]

[V-115] MR. DYE: On behalf of Bonas and Miller, I accept the words of the Government that the exhibits are all appropriate. Therefore, we have no objections to their going to the jury.

Thereupon, at 3:18 o'clock, p.m., the following proceedings were had in chambers out of the presence and hearing of the jury:

THE COURT: The record will show that the Court has assembled with counsel for the parties in the chambers of the Court at 3:18 on this date to receive a note from the United States Marshal sent from the jury. This is at 3:07 p.m. and it reads:

"Dear Judge

After 3 hours of deliberation on the indictments of Guy Leonard Prince, Jancinto Jose Banos and James Richard Miller, we are at a position of 11 guilty and 1 non-guilty on all counts and each individual named under

each count. The one party voting not guilty at this time claims there is nothing that could change his mind and that furthermore they will not change their position."

Well, I am not going to discharge this jury with 11 to 1.

This is a somewhat unusual message in that they [V-116] are deadlocked at 11 to 1, and as a matter of fact, in all the years, I've never received the count on the vote before. Of course, this is a rather unusual case. So I am going to send back a message.

"You will please continue your deliberations," and I am going to keep them deliberating until 5:00 o'clock, and then I'm going to bring them in and send them home until tomorrow, and I'm going to bring them in tomorrow and I'm going to give them the Allen charge and remind them what my instructions were about changing their position. I'm not going to let this thing go if it's 11 to 1.

MR. WEINER: If I may, your Honor—

THE COURT: You can put anything you want in the record.

MR. WEINER: The note indicates that the individual that's the hold-out, it says nothing's going to change his mind. Do you think time will change his mind?

THE COURT: I don't know. I don't know what will change his mind.

MR. DYE: Turn off the air conditioning.

THE COURT: Yes, that's right. No. No. They've been deliberating for, well, three hours in a case like this. The longer I'm exposed to jurors, the less I know about them. But I know I am not going to let this jury go after all this time on three hours because one guy's holding out, and that's [V-117] it. So—just a minute.

The Court proposes to send this message back to the jury.

"To the jury:

"Upon consideration of the information contained in your note, I instruct you to continue your deliberations."

Signed, "Joseph P. Kinneary, United States District Judge."

I would like to have your agreement on that to this note, but if you don't agree to it, I will send it in anyway. So that's an invitation for you to disagree, is it?

MR. WEINER: Always it is, Judge. No, I feel that since the note itself indicates that the individual that is the hold-out says that nothing's going to change his mind, I don't think additional time is going to do any good for an Allen charge or anything else.

MR. DYE: Your Honor, I don't think we have a right to object at this point in time. They've only been deliberating—I think at 5:00 o'clock today, and they're still hopelessly deadlocked, I think at that point we might give serious consideration to a mistrial.

THE COURT: I give this note in charge of the Reporter.

MR. WEINER: Who's the foreperson, do we know?

THE COURT: No, no, don't ask any questions.

[V-118] MR. WEINER: All right.

THE COURT: I think I know who it is but—

MR. WEINER: I think I do, too.

[JURY VERDICT ANNOUNCEMENT]

Thereupon, at 4:07, the jury, indicating it had reached a verdict, was returned to the jury box, and the following proceedings were had in the presence and hearing of the jury and in open Court:

THE COURT: The record will show that the United States Marshal has informed the Court that the twelve regular members of the jury impaneled in this action

have reached verdicts. Accordingly, the jury has been returned to the Courtroom, and the twelve members of the jury are now seated in the jury box in their proper places.

The Court further notes that the United States Attorney is present, and that the Defendants, Guy Leonard Prince, Jancinto Jose Banos and James Richard Miller are present, together with their counsel, Mr. Samuel Weiner and Mr. Lewis Dye.

Ladies and gentlemen of the jury, the person you have selected as your foreperson will please stand.

Mr. Wisemiller, has the jury reached unanimous verdicts as to the guilt or innocence of the three Defendants on the charges on which they were tried and submitted to your deliberation in this action?

[V-119] MR. WISEMILLER: Yes, we have.

THE COURT: All right. Will you please hand the verdicts to the United States Marshal?

The three Defendants will please stand, not their counsel, not their counsel, just the Defendants. All right.

The Clerk will please read the verdicts.

THE CLERK: United States District Court, Southern District of Ohio, Eastern Division. Criminal No. CR-2-87-200, the United States of America versus Guy Leonard Prince, Jancinto Jose Banos and James Richard Miller.

Verdict form:

Count 1. Guy Leonard Prince, guilty; Jancinto Jose Banos, guilty; James Richard Miller, guilty.

Count 2. Jancinto Jose Banos, guilty.

Count 3. James Richard Miller, guilty.

Count 5. Jancinto Jose Banos, guilty.

Count 6. Guy Leonard Prince, guilty; James Richard Miller, guilty.

Dated June 21, 1988, signed Gerald W. Wisemiller, foreperson. Cosigned by the 11 remaining jurors.

THE COURT: All right. The Defendants will please be seated.

Mr. Weiner and Mr. Dye, do you wish a poll of the jury?

MR. WEINER: We do, your Honor.

[POLLING OF JURORS]

[V-120] THE COURT: All right. The Clerk will please poll the jury.

THE CLERK: Very well, your Honor.

As I call your names, please stand, answer my question and then be seated.

Brett Irwin, the verdicts that I have just read into the record, are these your verdicts, sir?

MR. IRWIN: Yes, sir.

THE CLERK: Lawrence Odom, the verdicts that I have just read into the record, are these your verdicts, sir?

MR. ODOM: Yes.

THE CLERK: Betty Snider, the verdicts that I have just read into the record, are these your verdicts, ma'am?

MS. SNIDER: Yes.

THE CLERK: Jane Warden-Engott, the verdicts that I have just read into the record, are these your verdicts, ma'am?

MS. WARDEN-ENGOTT: Yes, they are.

THE CLERK: Gerrod Wisemiller, the verdicts that I have just read into the record, are these your verdicts, sir?

MR. WISEMILLER: Yes, sir.

THE CLERK: Carole Spiker, the verdicts that I have just read into the record, are these your verdicts, ma'am?

MS. SPIKER: Yes.

THE CLERK: Kenneth Logan, the verdicts that I have [V-121] just read into the record, are these your verdicts, sir?

MR. LOGAN: Yes.

THE CLERK: Rebecca Wildman, the verdicts that I have just read into the record, are these your verdicts, ma'am?

MS. WILDMAN: Yes.

THE CLERK: Harry Smith, the verdicts that I have just read into the record, are these your verdicts, sir?

MR. SMITH: Yes.

THE CLERK: Jean Freeland, the verdicts that I have just read into the record, are these your verdicts, ma'am?

MS. FREELAND: Yes.

THE CLERK: Lois Hingsbergen, the verdicts that I have just read into the record, are these your verdicts, ma'am?

MS. HINGSBERGEN: Yes.

THE CLERK: And Jeffrey Armstrong, the verdicts that I have just read into the record, are these your verdicts, sir?

MR. ARMSTRONG: Yes, they are.

THE CLERK: That concludes the polling of the jury, your Honor.

THE COURT: Miss Jones, do you have any objection to the Court discharging the jury in Criminal 2-87-200?

MS. JONES: No, sir.

THE COURT: Mr. Weiner, do you have any objection to [V-122] the Court discharging the jury in Criminal 2-87-200?

MR. WEINER: No, your Honor.

THE COURT: The same question to Mr. Dye.

MR. DYE: Yes, your Honor. Juror No. 2, Mr. Odom, indicated only similar verdicts were his, not all of them.

THE COURT: Just a minute. Just a minute. Come up here. Come up here. Counsel, all counsel come up here.

Thereupon, Court and counsel confer at the bench out of the hearing of the jury.

[QUESTIONING OF JUROR #2]

Thereupon, the following proceedings were had at the bench out of the hearing of the jury:

THE COURT: Read back what Juror No. 2 said when Dick asked him if these were his verdicts.

MR. DYE: We started with Mr. Irwin.

(Polling of Mr. Odom read.)

MR. DYE: Your Honor, for the Court, he said some of them. He didn't say yes or no.

THE COURT: Did you hear it?

MR. DYE: Yes.

THE COURT: Did you hear anything he said?

MS. JONES: I didn't hear it, but make an inquiry.

Thereupon, the following proceedings were had in the [V-123] presence and hearing of the jury:

THE COURT: Mr. Odom, please stand, Juror No. 2.

Mr. Odom, when the Clerk asked you if the verdicts as just read into the record, were these your verdicts, did you say yes?

MR. ODOM: I said semi.

THE COURT: You said what?

MR. ODOM: Semi.

THE COURT: Did you sign—did you sign the verdict form?

MR. ODOM: I was talked into it. I was talked into it.

THE COURT: What did he say?

MS. JONES: He was talked into it.

MR. ODOM: I was talked into the not guilty.

THE COURT: All right. I'm going to send you back and continue your deliberations, and I'm going to bring you back into the Courtroom.

Now, I want to ask you a question, again. Stand up. You participated in the deliberations?

MR. ODOM: Yes, I did.

THE COURT: And after discussion, after the foreman of the jury sent the question out to the Court and I sent my answer back to continue your deliberations, you say you were talked into voting for a conviction?

MR. ODOM: Pretty much.

[V-124] THE COURT: All right. But you did vote yes for conviction; is that correct? You did agree, you did vote yes for a conviction along with the other 11 members of the jury?

MR. ODOM: Not at first.

THE COURT: What?

MR. ODOM: Not at first.

THE COURT: But you did finally?

MR. ODOM: Yes.

THE COURT: So your signature on the verdict form, which is under No. 1, that is your signature? That means that you voted yes in accordance with the verdict form; is that correct?

MR. ODOM: Yes.

THE COURT: All right. That's all. That's all.

Thereupon, the following proceedings were had at the bench out of the hearing of the jury:

MR. WEINER: Note our exceptions.

MR. DYE: Note exceptions.

I would ask that the Court question the juror to see if these are his—

THE COURT: No, I am not going to, not one word. Not one word.

Thereupon, the following proceedings were had in the [V-125] presence and hearing of the jury:

THE COURT: Ladies and gentlemen of the jury, the Court thanks you for your services in this case and I'm going to discharge the jury now.

And ordinarily, the Court instructs the jury that they do not have to talk about how or why they arrived at the verdict in this case. There is a rule of Court in this District which does not allow counsel for the parties to question the jurors, and in your case, Mr. Odom, I specifically instruct you not to talk to the counsel in this case. Do you understand that?

MR. ODOM: Yes, sir.

THE COURT: You are bound by your verdict. Yes. All right. You are now discharged and the United States Marshal will conduct the jury from the Courtroom.

Thereupon, the following proceedings were had out of the presence and hearing of the jury:

THE COURT: The Defendants, Guy Leonard Prince, Jancinto Jose Banos and James Richard Miller, are now placed in the custody of the United States Marshal; and counsel for the Defendants may, if they choose, file a motion for the reinstitution of bail in this case. The Court will consider their motion. That is all.

The Clerk will adjourn the Court until 9:00 o'clock [V-126] tomorrow morning.

MOTION OF DEFENDANTS FOR A NEW TRIAL

(Filed June 27, 1988)

Case No. CR-2-87-200

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUY LEONARD PRINCE, *et al.*,
Defendants.

JUDGE JOSEPH P. KINNEARY

MOTION OF DEFENDANTS FOR A NEW TRIAL

Now come the defendants, by and through their attorneys, Sam B. Weiner and Lewis William Dye, and move the Court for an order granting a new trial in the above-styled matter because the verdict of the jury may not have been unanimous as to all counts involving the defendants.

Respectfully submitted,

/s/ SAM B. WEINER
743 South Front Street
Columbus, Ohio 43206
Phone: (614) 443-6581
Trial Counsel for Defendant Guy Leonard Prince

/s/ LEWIS WILLIAM DYE
555 South Third Street
Columbus, Ohio 43215
Phone: (614) 224-7298
Trial Counsel for Defendants Jacinto Jose Banos and James Richard Miller

MEMORANDUM IN SUPPORT

C.R. 31 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> Verdict (a)
> "The verdict *shall be unanimous.* . . ."
> (d) Poll the Jury. "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged." . . .

On Tuesday, June 21, 1988 the Court, over objection of trial counsel for defendant Prince, sent a verdict form to the jury that allowed for only one set of signatures for the entire indictment as opposed to signatures reflecting the jury's decision as to each defendant and each count. The risk run by such a verdict form was that someone may not agree with all of the decisions made by the jury and had no way to express that disagreement.

After approximately three hours of deliberation, the jury sent the Court a note indicating that they were hung and unable to reach a verdict. Rather than granting a mistrial at that time, the Court ordered that the jury continue its deliberations. Approximately thirty to forty-five minutes later the jury reached a verdict. Upon an initial poll of the jury, it appeared that all twelve members concurred in each verdict. However, when defense counsel for one of Prince's co-defendants asked that Juror #2 be questioned, it was apparent from his answers that he did not concur in all of the verdicts. When questioned by the Court, Juror #2 indicated that he was "talked into signing the verdict" forms and that the verdicts were "semi" his view of the culpability of the defendants. No further inquiry was allowed to be made of this juror and no further deliberation was authorized by the Court.

As the record stands presently, it is obvious that Juror No. #2 did not concur in the entire decision of the jury and was, because of the nature of the verdict form, unable to express his opinion as to what defendant was guilty of which crime. It is for the above reasons that the defendant, Guy L. Prince, moves the Court for an order granting him a new trial.

Respectfully submitted,

/s/ SAM B. WEINER
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Guy Leonard Prince

/s/ LEWIS WILLIAM DYE
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Trial Counsel for Defendants
Jacinto Jose Banos and
James Richard Miller

CERTIFICATE OF SERVICE

The undersigned certify that a true copy of the foregoing was delivered to Robyn R. Jones, Assistant United States Attorney, at 85 Marconi Boulevard, Columbus, Ohio 43215, this 27 day of June, 1988.

/s/ SAM B. WEINER
Trial Counsel for Defendant
Guy Leonard Prince

/s/ LEWIS WILLIAM DYE
Trial Counsel for Defendants
Jacinto Jose Banos and
James Richard Miller

MOTION TO ENLARGE TIME TO FILE A PETITION FOR REHEARING AND PETITION FOR REHEARING

(September 30, 1991)

Case No. 90-3954

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

GUY LEONARD PRINCE,

Defendant-Appellant.

MOTION TO ENLARGE TIME

Now comes the Appellant Guy L. Prince and moves this Honorable Court to enlarge the time in which the Appellant may file for relief from the Judgment of this Court. In support of this Motion, the Appellant attaches a copy of the proposed Motion, and Memorandum In Support.

Respectfully submitted,

/s/ LEWIS WM. DYE
Attorney for Defendant-Appellant
555 South Third Street
Columbus, Ohio 43215
(614) 224-7298

MEMORANDUM IN SUPPORT

This counsel filed on September 19, 1991 in the case of *U.S.A. vs. Banos,* Case No. 91-3110, a Petition For Rehearing, which has been now denominated a Motion of a panel rehearing. Mr. Banos is a co-defendant of Mr. Prince, and the issues which are to be presented in the *Banos* case will in all pertinent respects be the same as those which counsel wishes to bring to the attention of the Court in this case.

This counsel was not counsel for Mr. Prince, and therefore did not know that the time for Mr. Prince would run on September 20, 1991. Current counsel for Mr. Prince has agreed for this counsel to pursue this Motion.

Granting this Motion would permit the Court to make one ruling in regard to both Mr. Banos and Mr. Prince, and thus, to have uniformity of decisions in regard to both persons whose cases have the same issues.

Respectfully submitted,

/s/ LEWIS WM. DYE
Attorney for Defendant
555 South Third Street
Columbus, Ohio 43215
(614) 224-7298

CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by ordinary U.S. Mail to the Office of Robyn Jones, Assistant U.S. Attorney, 85 Marconi Boulevard, Room 200, Columbus, Ohio 43215 this 25th day of September, 1991.

/s/ LEWIS WM. DYE
Attorney for Defendant

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 90-3954

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GUY LEONARD PRINCE,
Defendant-Appellant.

PETITION FOR PANEL REHEARING

Now comes Defendant-Appellant through his attorney, Lewis Wm. Dye, and pursuant to Rule 35 and 40 of the Federal Rules of Appellant Procedure, suggests that a rehearing be Ordered.

Respectfully submitted,

/s/ LEWIS WM. DYE
Attorney for Defendant
555 South Third Street
Columbus, Ohio 43215
(614) 224-7298

MEMORANDUM IN SUPPORT

This Court in Defendant-Appellant's first appeal remanded this cause to the District Court on the issue of "off the record" conferences during the course of the trial. The implication of that decision was to enable the attorney to proffer testimony in order to demonstrate the prejudice to his client by the "off the record" conferences.

The District Court did not afford counsel this opportunity. Instead, he made a factual determination that no hearing was demanded by counsel, that by virtue thereof, there was no proffered testimony of the prejudice. By this reasoning, the Court concluded, by yet another example of "off the record" jurisprudence, that the Defendant was not prejudiced since no evidence was proffered in support of this reasoning. The District Court thereby eliminated the defect of the "off the record" conferences during trial by essentially making a factual determination based upon another "off the record" conference.

Counsel hereby submits an Affidavit in Support of his position in which demands were made to the District Court for a hearing on this matter, and by which he was led to believe that such a hearing would take place. This situation shows the wisdom of this Court's prior decision that conferences between the District Court should be recorded.

The District Court Judge, had a hearing been granted, would have been called as a witness, and knowing this refused to record the subsequent conference with counsel. By not recording this second conference, he cures his failure to record the first conference.

This Petition is based on counsel's belief that it is of exceptional importance to maintain and secure uniformity of the decisions of the Court.

Respectfully submitted,

/s/ LEWIS WM. DYE
Attorney for Defendant
555 South Third Street
Columbus, Ohio 43215
(614) 224-7298

CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by ordinary U.S. Mail to the Office of Robyn Jones, Assistant U.S. Attorney, 85 Marconi Boulevard, Room 200, Columbus, Ohio 43215 this 25th day of September, 1991.

/s/ LEWIS WM. DYE
Attorney for Defendant

(2)

No. 91-1784

FILED
JUL 8 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

GUY LEONARD PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
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QUESTIONS PRESENTED

1. Whether the district court violated Fed. R. Crim. P. 31(d) by questioning a juror for the purpose of clarifying his answer during a poll of the jury.

2. Whether the district court's failure to record bench conferences concerning the polling of the jury warranted a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1784

GUY LEONARD PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals remanding the case to the district court (Pet. App. A1-A16) and affirming the decision of the district court (Pet. App. A17-A22) are unreported, but the decisions are noted at 902 F.2d 1570 (Table) and 944 F.2d 906 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1991. The petition for rehearing was denied on March 4, 1992. Pet. App. A44. The petition for a writ of certiorari was filed on May 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; and carrying a firearm in furtherance of the conspiracy, in violation of 18 U.S.C. 924(c). He was sentenced to 181 months' imprisonment. Pet. App. A26, A29. The court of appeals affirmed. *Id.* at A17-A22.

1. Petitioner and his co-defendants were indicted in connection with their attempt in November 1987 to purchase cocaine from a government informant and an undercover narcotics agent. Pet. App. A2-A3. At trial, the jury deliberated for three hours and then sent a note to the district court indicating that it was deadlocked at 11-1 on all counts, and that the juror voting for acquittal "claimed there is nothing that could change his mind." The district court advised the jury to continue deliberating. Forty-five minutes later, it returned a unanimous verdict of guilty on all counts. *Id.* at A9.

According to the record made at trial, Juror No. 2 (Mr. Odom) was asked by the clerk during the poll of the jury whether "the verdicts that I have just read into the record, are these your verdicts, sir?" and responded "Yes." Pet. App. A9. At the conclusion of the poll, however, counsel for one of the defendants objected to discharging the jury because he thought Odom had said something to indicate that he agreed with only some of the verdicts. *Ibid.* The following colloquy ensued:

> THE COURT: Mr. Odom, please stand. Juror No. 2.

Mr. Odom, when the Clerk asked you if the verdicts as just read into the record, were these your verdicts, did you say yes?

MR. ODOM: I said semi.

THE COURT: You said what?

MR. ODOM: Semi.

THE COURT: Did you sign—did you sign the verdict form?

MR. ODOM: I was talked into it. I was talked into it.

* * * * *

THE COURT: All right. I'm going to send you back and continue your deliberations, and I'm going to bring you back into the Courtroom.

Now, I want to ask you a question, again. Stand up. You participated in the deliberations?

MR. ODOM: Yes, I did.

THE COURT: And after discussion, after the foreman of the jury sent the question out to the Court and I sent my answer back to continue your deliberations, you say you were talked into voting for a conviction?

MR. ODOM: Pretty much.

THE COURT: All right. But you did vote yes for conviction, is that correct? You did agree, you did vote yes for a conviction along with the other 11 members of the jury?

MR. ODOM: Not at first.

* * * * *

THE COURT: But you did finally?

MR. ODOM: Yes.

THE COURT: So your signature on the verdict form . . . that is your signature? That means that you voted yes in accordance with the verdict form, is that correct?

MR. ODOM: Yes.

Pet. App. A9-A10. Over the objections of defense counsel, the court then accepted the verdicts of guilty and discharged the jury. *Id.* at A10.

2. On appeal, the court of appeals rejected petitioner's challenge to the district court's acceptance of the verdict and discharge of the jury following the poll. The court of appeals acknowledged that a defendant would be seriously prejudiced if a district court coerced a juror into "surrendering his conscientiously held view that the defendant should be acquitted." Pet. App. A11. It held, however, that no such coercion occurred here. Rather, the court observed, the trial judge in this case did no more than question a juror to clarify his response to the poll. The court of appeals distinguished this case from one in which "a juror, having indicated some reluctance to express con-currence during a jury poll, is required to cast a vote in open court." Here, in contrast,

> [o]nce the juror explained that, while he did "[n]ot at first" vote with the other jurors, but "finally" did so after he was "[p]retty much" "talked into it," the court was warranted in concluding that the juror had arrived at his verdict through the

> type of deliberative process in which juries are expected to engage; that he had in fact voted for a verdict of guilty and had not changed that vote when polled; and that the jury unanimously concurred in the verdict.

Ibid. Although the court of appeals said that the better course might have been to permit the attorneys in the case to question the juror, it found that, in the circumstances of this case, the district court did not abuse its discretion by questioning the juror as it did. *Id.* at A12.

Petitioner also claimed that the district court violated 28 U.S.C. 753(b) by failing to record bench conferences at which petitioner's attorney objected to the conduct of the jury poll.[1] Pet. App. A5-A6. Relying on *United States* v. *Gallo*, 763 F.2d 1504 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986), the court of appeals ruled that a violation of the recording requirement did not mandate reversal unless the defendants could demonstrate prejudice. The court remanded the case to the district court "to address the effect of its failure to adhere to the requirements of 28 U.S.C. § 753." Pet. App. A7.

On remand, the district court determined that petitioner and his co-defendants were not entitled to a new trial. Pet. App. A34-A42. The court of appeals affirmed that ruling. *Id.* at A17-A22. Noting that the district court had transcribed the colloquy between the court and juror Odom, as well as the defendants' objections to the ultimate discharge of the jury, *id.* at A20-A21, the court observed that petitioner and his co-defendants had failed to demonstrate "how a

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[1] That statute requires that a reporter shall * * * "record[] verbatim by shorthand, [or by] mechanical means * * * (1) all proceedings in criminal cases had in open court."

verbatim account of what was said in any of the bench conferences could possibly have shown that they are entitled to new trials." *Id.* at A21.

ARGUMENT

1. Fed. R. Crim. P. 31(d) provides that if, upon the poll of the jury, "there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged." Petitioner contends (Pet. 8-11) that the district court violated the Rule by attempting to clarify juror Odom's response to the jury poll. That Rule, petitioner argues, gives the court only two options—discharging the jury with a mistrial, or directing the jury to resume deliberations; it does not allow the court to address additional questions to the jury.

The flaw in petitioner's argument is that the two options set forth in Rule 31(d) apply only when it becomes clear that "there is not unanimous concurrence." Nothing in Rule 31(d) forbids a court from questioning a juror to determine whether there is or is not unanimous concurrence in the announced verdict.

Contrary to petitioner's suggestion (Pet. 9-10), neither the Fifth Circuit nor any other court of appeals bars the judge from questioning a juror to clarify an ambiguous response to a jury poll. See, *e.g.*, *United States* v. *Duke*, 527 F.2d 386, 394 (5th Cir.) (permitting questions addressed to juror to clear up ambiguous response during jury poll), cert. denied, 426 U.S. 952 (1976).[2] Moreover, the courts in *Amos* v. *United*

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[2] The court in *Duke* distinguished its earlier decision in *United States* v. *Sexton*, 456 F.2d 961 (5th Cir. 1972), on which petitioner relies. In *Sexton*, the trial judge "had virtually forced a juror to make a decision in open court by asking a juror, who stated that he had not voted either way, whether

States, 496 F.2d 1269 (8th Cir.), cert. denied, 419 U.S. 896 (1974), and *United States* v. *McCoy*, 429 F.2d 739 (D.C. Cir. 1970), did not state a categorical rule that the jury must always be required to resume deliberation following an inquiry into a juror's ambiguous response. Rather, the courts of appeals have uniformly held that, when a juror's response to a poll is unclear, the court may question a juror to clarify his answer, and that if the answer makes clear that the juror concurred in the verdict, the court may accept the verdict as unanimous. See, *e.g.*, *Williams* v. *United States*, 419 F.2d 740, 746 (D.C. Cir. 1969) (en banc) (evidence during a jury poll of a juror's uncertainty "does not require setting the trial at naught," since further inquiry "can serve to clear up apparent confusion" concerning the juror's verdict), cert. denied, 409 U.S. 857 (1972); *United States* v. *Hernandez-Garcia*, 901 F.2d 875, 877-878 (10th Cir.), cert. denied, 111 S. Ct. 125 (1990); *United States* v. *Tapanes*, 685 F.2d 1291, 1292 (11th Cir. 1982); *Amos* v. *United States*, 496 F.2d at 1273. In so holding, the courts have recognized a "distinction in law and in fact between actions of the trial judge to obtain clarity in place of confusion, and actions that produce a likelihood that a juror has been coerced." *Williams* v. *United States*, 419 F.2d at 746; *United States* v. *Duke*, 527 F.2d at 394 (differentiating between "the conduct of a trial judge who attempts to obtain clarity and that of a trial judge who attempts to coerce a final verdict"); *Amos* v.

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the verdict of the jury was his verdict." *Duke*, 527 F.2d at 394. In this case, the court did not force juror Odom to make a decision in open court; the court simply sought to ascertain what juror Odom's actual verdict had been. Unlike the juror in *Sexton*, juror Odom never stated that he had not concurred in the final verdict reached by the jury before it announced that it had reached a verdict.

United States, 496 F.2d at 1273 (citing *Williams* v. *United States*, *supra*, for the proposition that "Rule 31(d) gives the court some latitude in polling of the jury to clear up an apparent confusion" but does not permit the judge to "require[] a jury to reveal its decision when no verdict has been returned.").

In this case, the district court properly attempted to clear up the uncertainty engendered by juror Odom's initial response to the jury poll. When the trial court's second inquiry produced the response, "[s]emi," the district court further questioned him to ascertain whether that comment was meant to indicate that he concurred in the verdict. As the court of appeals correctly concluded, the court's questions were not impermissibly coercive. The meaning of juror Odom's responses to the poll and to the court's initial attempts at clarification were ambiguous; at no point, however, did Odom deny that he had voted for conviction. The district court simply attempted to determine whether juror Odom meant to indicate that he had actually voted for a conviction. Because the court's questions in no way compelled juror Odom to change his decision or to make a decision in the first instance, the questioning did not violate Rule 31(d).[3]

2. Petitioner also contends (Pet. 12-13) that the district court's failure to record bench conferences at which the jury poll was discussed, in violation of 28

[3] This case is quite unlike *United States* v. *McCoy*, *supra*, and *Matthews* v. *United States*, 252 A.2d 505 (D.C. 1969), on which petitioner relies. In both of those cases, a juror gave an equivocal answer during the jury poll; the trial judge did not seek to clarify the meaning of the juror's response, as did the court in this case, but instead instructed the juror to answer yes or no to the question whether the juror concurred in the verdict. The trial judge thus in effect required the juror to reach a verdict in open court. 429 F.2d at 741; 252 A.2d at 506.

U.S.C. 753, requires reversal of his conviction. He contends that this Court should resolve a conflict between the Sixth Circuit's decisions in this case and in *United States* v. *Gallo*, 763 F.2d 1504 (1985), cert. denied, 475 U.S. 1017 (1986), and the Fifth Circuit's decision in *United States* v. *Selva*, 559 F.2d 1303 (1977).

The outcome of the case is consistent with both *Gallo* and *Selva*. In *Selva*, 559 F.2d at 1305, 1306, the court recognized that, ordinarily, "failure to comply with the Act is not error per se and will not work a reversal absent a specific showing of prejudice." It qualified that rule, however, by stating that "[w]hen * * * a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal."

As the court in *Gallo* recognized, 763 F.2d at 1530, "*Selva* states two different standards depending on whether the same counsel represented defendant at trial and on appeal. If the counsel is the same, *Selva* requires an appellant to show hardship and prejudice before a court will find reversible error"—the same showing that the defendant is required to make under *Gallo*. Because petitioner was represented by the same lawyer on appeal, he is not excused from showing prejudice even under *Selva*. Cf. Pet. App. A21 (discussing application of *Selva* to co-defendant Miller, who retained new counsel on appeal). Moreover, the Fifth Circuit's rule in *Selva* applies only when a "substantial and significant portion of the record" has not been recorded. *Selva*, 559 F.2d at 1306. In this case, the only portions of the proceedings that were not recorded were a number of the bench conferences held in the course of the trial. Pet.

App. A18, A35. Because the failure to record some of the bench conferences at trial is not equivalent to failure to record the entire trial or a "substantial and significant portion" of the trial, the Fifth Circuit's per se rule of reversal set forth in *Selva*, whatever its validity, does not apply to a case such as this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant Attorney General

KRISTINA L. AMENT
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JULY 1992